IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.10.2006

CORAM

THE HONOURABLE MR.JUSTICE R.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE V.DHANAPALAN

A.S.NO.113/1991, C.M.P.NO.14303/2005 & C.M.A.NO.336/1987

P.R.Aithala alias
P.Ramakrishna Aithala ... Appellant in both the appeals (Plaintiffs

Vs.

Hindusthan Petroleum Corporation
Limited, 24, Pantheon Road,
Egmore, Madras - 8. ... Respondent in both the appeals (Defendant)

A.S.No.113 of 1991:

APPEAL under Section 96 of the Code of Civil Procedure against th judgment and decree dated 21.12.1983 made in O.S.No.3590 of 1982 on th file of II Additional City Civil Judge, Madras.

C.M.A.No.336 of 1987:

APPEAL under Section 9 (A) of the Tamilnadu City Tenant Protection Act III of 1922 against the order and decree date 21.12.1983 made in I.A.No.12457 of 1982 in O.S.No.3590 of 1982 on th file of II Additional City Civil Judge, Madras.

For Appellant : Mr. N.R.Chandran, S.C.
for Mr.R.Bharanidharan

For Respondent: Mr.G.Masilamani, S.C.
For M/s. King & Patridge

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C O M M O N J U D G M E N T

(Judgment of the court was delivered by
Justice R.Balasubramanian)

The regular first appeal arises out of the judgment and decre dated 21.12.1983 in O.S.No.3590 of 1982 on the file of the Secon Additional City Civil Court declaring that the defendant in the suit i

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entitled to buy the property forming the subject matter of the sui under Section 9 of the Tamilnadu City Tenants' Protection Act, failin which the defendant should deliver vacant possession to the plaintif and the defendant to pay a sum of Rs.812.50 per month to the plaintif till the defendant gets the sale deed in it's name. Hence, th plaintiff in that suit is before this Court in this appeal. Pendin appeal, the plaintiff filed C.M.P.No.14303 of 2005 under Order 41 Rul 27 of the Code of Civil Procedure to receive additional evidence. Th defendant in that suit filed I.A.No.12457/1982 under section 9 of th Tamil Nadu City Tenants' Protection Act. It was ordered as prayed fo by order and decreetal order dated 21.12.1983 by the II Additiona City Civil Court. Therefore the plaintiff in the suit is before us i the Civil Miscellaneous Appeal. In both the proceedings, th defendant in the suit and the petitioner in the application filed unde Section 9 of the Tamilnadu City Tenants Protection Act is th respondent. In this common judgment, for convenience sake, we refe the parties as the plaintiff and the defendant. Heard Mr.N.R.Chandran learned senior counsel appearing for the plaintiff and Mr.G.Masilamani learned senior counsel appearing for the defendant.

2. We summarise the plaint allegation in O.S.No.3590 of 1982 a here under:

> "The plaintiff is the owner of the land forming the subject matter of the suit. It was leased out under a registered lease deed dated 26.2.1962 to Standard Vaccum Oil Company. The lease was for a period of ten years on a monthly rent of Rs.650/-. The lease deed contains a renewal clause for a further period of ten years from the expiry of the first period of ten years on a rent to be fixed by the plaintiff. On the expiry of the first period of lease, the plaintiff filed O.S.No.4400 of 1972 for recovery of possession against the defendant in the present suit and another who are the successors-in-interest of Standard Vaccum Oil Company. The suit was dismissed and the appeal filed against that judgment and decree was also dismissed. The second appeal filed against those judgments is pending before this Court (we add that the second appeal was dismissed as withdrawn at a later stage). The plaintiff filed O.S.No.7553 of 1980 claiming arrears of damages quantified at Rs.33,475/- till 10.2.1980. That suit is also pending disposal. The defendant had not delivered vacant possession of the property even after the expiry of the second period of ten years, which came to an end on 10.2.1982. The property is situated in a posh area and therefore would fetch atleast Rs.3,000/- per month as rent. Therefore, the defendant is liable to pay a sum of Rs.3,000/- per month as damages for use and occupation. The plaintiff by his letter dated 1.2.1982 called upon the defendant to quit and deliver vacant possession of the property on the expiry of 10.2.1982. The defendant received

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the notice. But failed to comply with the demand. The defendant has no authority to stay in the suit property. The cause of action arose on the expiry of ten year period after the first period under the lease deed was over....."

On the above allegations, the plaintiff wanted delivery of possessio of the property and for a sum of Rs.3,000/- per month as damages fo use and occupation from the date of the plaint till the date o delivery of possession.

3. The defendant contended as here under:

"The lease deed dated 26.6.1962 in favour of the predecessors-in-interest of the defendant is true and the terms of the lease is also true. After the expiry of the first period of ten years, renewal of the lease for a further period of ten years was claimed. The plaintiff refused to renew the lease and filed O.S.No.4400 of 1972 in the City Civil Court, Chennai seeking recovery of possession. That suit was dismissed. The appeal arising there from, namely, A.S.No.377 of 1979 was also dismissed. Second Appeal No.2257 of 1981 further arising there from is pending. The defendant is the successor-in-interest of the original tenant, namely, Standard Vaccum Oil Company and therefore it is a tenant within the meaning of the Tamilnadu City Tenants Protection Act. The defendant filed I.A.No.12457 of 1982 under Section 9 of the Tamilnadu City Tenants Protection Act. As the defendant is a statutory tenant, claim for damages is not maintainable. A sum of Rs.3,000/- estimated as damages per month is arbitrary and excessive. The claim must therefore be rejected."

4. On the above pleadings, the trial Court framed the followir issues:

a) Is not the defendant entitled to the benefits flowing out of Section 9 of the Tamilnadu City Tenants' Protection Act?

b) Is the defendant liable to pay damages to the plaintiff?

c) Whether as a rent or damages, what would be the amount the plaintiff would be entitled to?

d) To what are the relief the parties are entitled to?

5. It must be noticed that O.S.No.3590 of 1982 along wit I.A.No.12457 of 1982 and O.S.No.7553 of 1980 - suit for arrears o damages, came to be disposed of by a common judgment. The defendar filed I.A.No.12457 of 1982 under Section 9 of the City Tenant Protection Act. The pleading in support of the application is as her under:

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"2. The Plaintiffs have filed the above suit against the defendant in this Hon'ble Court for recovery of possession of a piece of vacant land admeasuring 10,000 square feet and for recovery of damages for use and occupation at the rate of Rs.3,000/- per month. The suit summons was served on the Defendant only on 1.7.1982. A large extent of land admeasuring 10,000 square feet in Door No.242, Royapettah High Road, Madras – 600 014 was leased by the plaintiffs to Standard Vaccum Oil Company, by a Registered Deed of Lease dated 22.6.1962, on a monthly rental of Rs.650/- for a period of 10 years. Standard Vaccum Oil Company merged with another foreign company called Esso Standard Eastern Incorporation. In the year 1974 the Government of India took over the said Esso Standard Eastern Incorporation by an Act of Parliament Act 4 of 1974 and vested the same in the new Government Company called the Hindustan Petroleum Corporation Limited, the present Defendant herein. It is not disputed that ever since 22.6.1962 Standard Vaccum Oil Company and its successors in interest companies have been in continuous possession of the suit site. The tenancy of the successor companies have been recognised by the plaintiffs and the plaintiffs have been receiving rents from the defendant till recently.

3. The defendant states that it is a successor in interest to the erstwhile Standard Vaccum Oil Company and the Esso Standard Eastern Incorporation and hence is a tenant within the meaning of Section 2(4) of the Madras City Tenants Protection Act of 1921 as amended upto date. The defendant therefore states that as a tenant it is entitled to purchase the suit site from the plaintiffs under Section 9 of the said Act at a market price to be fixed by this Hon'ble Court. This petition is therefore filed for an order for the purchase of the said land.

4. The defendant therefore prays that this Hon'ble Court may be pleased to direct the Plaintiffs/Respondents to sell the suit land to the Defendant/Petitioner at a market price to be fixed by this Hon'ble Court."

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The plaintiff filed a counter contending, among other things, as her under:

"I submit that the application filed by the petitioner under Section 9 of the Act is not maintainable in law on the ground that the petitioner do not come under the definition of tenant as per Section 2 (4) of the Act."

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Ultimately the suit in O.S.No.3590 of 1982 came to be disposed b judgment and decree dated 21.12.1983 on the following lines:

> "The defendant is entitled to the protection under Section 9 of the Tamilnadu City Tenants Protection Act and an order accordingly in I.A.No.12457 of 1982 is passed; in case the defendant did not buy the property as ordered, then the defendant must deliver vacant possession of the property to the plaintiff; when the plaintiff files execution petition for recovery of possession, then the final order in I.A.No.12457 of 1982 must be filed and on the basis of which only the relief could be granted; the defendant should pay a sum of Rs.812.50 per month to the plaintiff; such payment will be upto the date on which the sale is to take place and the defendant has to bear half the cost."

In the suit filed by the plaintiff one witness as P.W.1 was examine besides marking Exs. A.1 to A.5. Neither oral nor documentary evidenc was brought before Court at the instance of the defendant. By the sam judgment dated 21.12.1983 I.A.No.12457 of 1982 in O.S.No.3590 of 198 was allowed. As noted earlier, it is the decree in O.S.No.3590 of 198 and the order in I.A.No.12457 of 1982 are in challenge in this regula First Appeal and the Civil Miscellaneous Appeal.

6. C.M.P.No.14303 of 2005 is filed by the plaintiff to receiv the judgment and decree dated 6.3.1979 in O.S.No.4400 of 1972 and th judgment and decree dated 1.8.1980 in A.S.No.377 of 1979 arising ther from as additional evidence. In support of the petition, an affidavi is filed sworn to by the petitioner himself. In paragraph 10 and 11 o the affidavit filed in support of the application alone the followin averments have been made for receiving the additional documents:

> "The issue in the present suit essentially involves the fact as to whether the respondent herein is entitled for relief under the Madras City Tenants Protection Act. The question of granting relief under Section 9 of the Madras City Tenants Protection Act would not arise dur to fact that the respondent ceased to be in possession by virtue of subletting which has been documented in judgments rendered in O.S.No.4400 of 1972 and A.S.No.337 of 1979. Hence, it is just and necessary that the judgment and decree passed in O.S.No.4400 of 1972 and A.S.No.337 of 1979 are taken on record and marked as additional documents.
>
> Petitioner most humbly submits that due to his age and health he could not effectively follow the suit and other proceedings in respect of the suit schedule property. The petitioner herein only recently upon consulting his counsel came to know about the technicalities and the need to mark the judgment of the earlier proceedings in the present suit. Hence the present application. Serious prejudice and

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hardship would be caused to the petitioner if the application is not ordered as prayed for. On the contrary no prejudice would be caused to the respondent as the documents, which are sought to be marked are judgement and inter-parties which is admissible in evidence. Moreover the existence of the document cannot be disputed as the same forms part of the record of this Hon'ble Court in S.A.No.2258 of 1981. Valuable rights of the petitioner would be seriously prejudiced if the application is not allowed."

The defendant filed a counter to this application opposing tha essential ingredients of Order 41 Rule 27 of the Code of Civi Procedure are not established. According to the defendant, the reaso attributed for the non-production of the document on the face of it i incorrect and unacceptable. The plaintiff is guilty of laches ar there is an inordinate deliberate delay in producing the documents According to the defendant no new documents could be allowed to b brought as additional evidence to fill up the lacuna. The furthe objection is the affidavit filed in support of the application t receive additional documents do not set out the circumstances and fact warranting reception of additional evidence and that the presen application is only intended to delay and defeat the defendant' statutory right.

7. Mr.N.R.Chandran, learned senior counsel appearing for th plaintiff would submit that the defendant is not entitled to th protection under Section 9 of the City Tenants Protection Act, sinc the defendant is not in actual physical possession of the propert demised to him and the building standing thereon. To show that th defendant did not continue in actual physical possession of the lan and the building, additional documents produced before this Cour would throw enough light. Though there is delay in filing th additional documents, yet this Court, in order to do complete justic between the parties, can receive additional evidence. Since n prejudice at all would be caused to the defendant, additional evidenc can be received. The additional documents will not take the defendan by any surprise since they are parties to it and they are nothing bu the printed copy of the judgment in an earlier suit to which th plaintiff and the defendant are parties. The learned trial Judge ha committed an error in law in granting the relief to the defendant unde Section 9 of the Tamilnadu City Tenants Protection Act since it is no shown to be the tenant at all and if that order is set aside, th plaintiff would be entitled to the relief of possession prayed for b him in the suit. It is further argued by the learned senior counse that the defendant had a right to file an application under Section of the Tamilnadu City Tenants Protection Act in O.S.No.4400 of 1972 an yet, the defendant did not claim any such benefit in those proceedings Even assuming that on the date when the suit in O.S.No.4400 of 1972 wa filed, the defendant had no subsisting right, yet when the secon appeal was pending, which is a continuation of the suit, such a righ

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accrued to the defendant and he ought to have at least asked for th relief at that stage. Therefore on the principle of Resjudicata th defendant is prevented from claiming such right once again in th present proceedings or he is deemed to have waived his right Mr.G.Masilamani, learned senior counsel appearing for the defendar would contend that the plaintiff had not pleaded in the plaint filed i O.S.No.3590 of 1982 or in the counter filed by him to I.A.No.12457 c 1982 that the defendant did not continue in actual physical possessio of the property. Even in the grounds of appeals filed before thi court, namely, either in the first appeal or in the civil miscellaneou appeal, no ground is taken that the defendant does not continue i actual physical possession of the property. Whether the defendar continues in actual physical possession or not of the property is question of fact and therefore when the plaintiff had not pleaded t that effect at any stage, then to allow such a plea raised for th first time now by producing additional evidence would caus considerable prejudice to the defendant. Bringing to our notice cas law on the requirement of pleadings and the effect of failure to pleac learned senior counsel for the defendant would contend that th plaintiff is not entitled to any relief at all in both the proceeding filed by him before this Court. Learned senior counsel would conter that the defendant had never lost possession of the property and ther is no finding whatsoever in the earlier proceedings that the defendar lost possession. Learned senior counsel would further contend that i at all the defendant had any right accrued to him under Section 9 c the Tamilnadu City Tenants' Protection Act, it accrued to him for th first time only on Tamil Nadu Act 2/80 coming into force. Therefor in the pending when Second Appeal No. 2257 of 1981, the defendar could have filed an application under section 9 of the Act. Bu however, the present suit had come to be filed within a short tim after the withdrawal of the second appeal "as not pressed" and in th present suit the defendant filed the application under Section 9 of th Act. Therefore neither on the principle of res judicata nor on th plea of waiver the defendant can be non-suited.

8. In the light of the arguments advanced by learned senic counsel on either side and on the available pleadings, we are of th opinion that the following issues alone arise for consideration i these two appeals:

a) Is not the defendant entitled to protection under Section 9 of the Tamilnadu City Tenants Protection Act?

b) If not, whether the plaintiff is entitled to the relief of possession prayed for by him?

c) In the event of the plaintiff succeeding in the suit for possession, what is the quantum of damages for use and occupation which he is entitled to get?

9. In our considered opinion, any discussion on issue No. framed by us would be over lapping on issue No.2. Accordingly, we ha decided to take up issue Nos. 1 and 2 for a common discussion.

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tenant, if he is protected under the Tamil Nadu City Tenants Protection Act, hereinafter referred to as the "Act", must file a application under section 9 of the Act to the court for an orde directing the land owner to sell for a price to be fixed by the court the whole or part of the extent of land specified in the application Invariably, we find that every tenant/defendant always files a application for purchasing the entire extent of land demised to hi and seldom we have come across any case where the tenant/defendant ha expressed his readiness to purchase a smaller extent than the or demised to him. It is not as though once the defendant/tenant files a application to purchase the entire extent of land on the premise that he is entitled to the protection under the Act, the court i duty bound to pass an order directing sale of the entirety of th land. Under section 9(1)(b) of the Act, the court is called upon t first decide the minimum extent of land which may be necessary for th convenient enjoyment by the tenant. Once such an extent of land i arrived at by the court, then, the court shall fix the price for th said extent of land in the manner provided for in sub-section (b) t section 9(1) of the Act. The section also provides the course to b followed thereafter. These are the broad legal principles, which th court must have in deciding an application filed by th tenant/defendant under section 9 of the Act. It is only a "tenant" who alone is protected under the Act. "Tenant" is defined unde section 2(4) of the Act. We extract hereunder the definition o "tenant" as is relevant for the purpose of deciding this case:

> "(4) "Tenant" in relation to any land -
> (i) means a person liable to pay rent in respect of such land, under a tenancy agreement express or implied, and
> (ii) includes -
> (a) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement,
> (b) any person who was a tenant in respect of such land under a tenancy agreement to which this Act is applicable under sub-section (3) of section 1 and who or any of his predecessors in interest had erected any building on such land and who continues in actual physical possession of such land and building, notwithstanding that - "

The entirety of clause (ii) of sub-section (4) of section 2 of the Act as it stands today, was brought in by way of an amendment under sectio 2 of The Chennai City Tenants' Protection (Amendment) Act, 1973/ Tami Nadu Act 24/73. Prior to this amendment, the substituted provisio stood thus:

> "(ii) includes -
>
> (a) any such person as is referred to in sub-clause (i) who continues in possession of the land after the determination of the tenancy agreement, and

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(b) the heirs of any such person as is referred to in sub-clause (i) or sub-clause (ii)(a): but does not include a sub-tenant or his heirs."

There is no dispute that the defendant in the suit was not in th picture at all in the year 1962 when the land in question was demise to Standard Vaccum Oil Company. Standard Vaccum Oil Company wa succeeded by Esso Standard Eastern Incorporation and the defendar became the successor in interest of Esso Standard Eastern Incorporatio by an Act of Parliament. From the arguments advanced by the learne senior counsel on either side, this court can safely conclude that th defendant's claim to buy the land - as ordered by the lower court, ha to be decided on the basis of the definition of "tenant" as it stanc defined today under section 2(4)(ii)(b) of the Act. Then came th Madras City Tenants' Protection (Amendment) Act, 1979, which wa brought into force by Tamil Nadu Act 2/80, which received the assent o the President on 27.02.1980. This Act protects all tenancies create before the coming into force of this Act. But however, it is subjec to the tenant/tenants claiming protection satisfying the definition o "tenant" as it stood on the day when the Act came into force and a it continues even as on date. There is no gain saying in statin that the right to buy the land forming the subject matter of the sui accrued to the defendant in the case on hand only for the first tim after Tamil Nadu Act 2/80 came into force.

10. Section 2(4) of the Tamil Nadu City Tenants' Protection Ac sets out the requirements to be fulfilled by a person, before ever h could be treated as a "tenant". Admittedly, the defendant herein wa not the tenant at the inception and as noted earlier, he is only th successor in interest second in line of the tenant, who was put int possession initially. The period of lease at the inception was for 1 years commencing from the year 1962 and expiring with the year 1972 The tenant, at the inception, had an option for renewal for a furthe period of 10 years and accordingly, the tenant, who was inducted int possession originally, and the successors in interest had a right t be in possession for a total period of 20 years, made up of 10 year from 1962 to 1972 and 10 years from 1972 to 1982. There is no disput that at the inception of tenancy only a vacant land, measuring 100/10 feet in R.S.No.1139/2-B in Royapettah High Road in the registratio District of Mylapore, was leased. "Land" defined under section 2(2 of the Act excludes buildings. It must be shown, to get the benefit o the Act, that the predecessor in interest of the defendant had erecte a building on the land demised originally. We have no doubt at al that assuming that the defendant is in possession of the land, yet i the absence of evidence showing that the defendant's predecessor i interest had put up the superstructure on the land, it would no entitle it to buy the land. The Act is a beneficial Legislation an therefore the provisions of the Legislation must be interprete strictly in accordance with the expressed requirement of law. Th opening words of sub section (4) of section 2 starts as "tenant" i relation to "any land". Since the defendant's claim is based only o

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section 2(4)(ii)(b) of the Act, we have decided to read the definitio of "tenant" as hereunder:

> "Tenant" in relation to any land -
> includes -
> any person who was a tenant in respect of such land ..... who or any of his predecessors in interest had erected any building on such land
> and who continues in actual physical possession of such land and building ....."

The manner in which we have read the definition of tenant vis-a-vis th defendant is well within the powers of the court since, in so doing neither we have offended the section nor have we re-written th section. In other words, we have only divided the section int compartments so as to bring it more appropriate to the case of th defendant. The opening words used in sub section (4) of section 2 ar any land and thereafter in all the other places, we find that th Legislature had used the expression such land. Therefore th expression such land is referable to any land mentioned in the openir sentence of sub-section (4) to section 2 of the Act. If we understar the expression any land and such land used in various portions of th section extracted above, it definitely means only one thing namely, th expression such land found mentioned in the rest of the section i referable only to the expression any land used in the opening sentenc of the sub-section and any land is referable to the land demised t the tenant or his predecessor in interest. There cannot be any othe meaning to the expressions - any land and such land used in sub-sectio (4) to section 2 of the Act. A reading of section 2(4)(ii)(b) of th Act unerringly shows that a tenant, besides establishing that h continues in actual physical possession of the land and building, mus also establish that either he or any of his predecessors in interes had erected any building on such land. In this case, the defendar had not erected any building. Therefore it must be shown that hi predecessor in interest had erected the building before the defendar can take advantage of it and claim the benefit under the Act. Bu that is not the all. The most important requirement enumerated in th above referred to section is the last one and that is, the tenant, wh claims protection under the Act, continues in actual physica possession of such land and building. In other words, the sectio contemplates that the tenant, who claims protection under the Act, mus continue in actual physical possession of such land and building, whic ought to have been put by himself or his predecessor in interest To put it more clearly, the sine-qua-non for a tenant to get direction for the sale of the land is that, he continues in actua physical possession of such land and building, which ought to hav been erected by himself or his predecessor in interest.

11. This court, in the judgment reported in Vol.92 L.W.Pg.25 (T.R.P.Raja Sekara Bhoopathy Vs. Navaneethammal) had held as follows:

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"Therefore, the primordial requirement for a tenant to claim the benefits under the Act is that he should be in actual physical possession of such land and building."

In Vol.1998 L.W. Pg.99 (Hindustan Petroleum Corporation Ltd. Vs. Raj D.V.Appa Rao Bahadur), this court had held as follows:

"Besides under section 2(4)(ii)(b) of the Act, before a person can claim benefits as a tenant, he should have been a tenant of land under tenancy agreement prior to 12th September, 1955 and such person or his predecessors-in-interest should have erected the building on the land of such a person and have continued in actual physical possession of the land and the building."

In I.L.R.1996 (3) Madras Pg.671 (Hindustan Petroleum Corporation Ltd Vs. K.M.Yakub), a learned Single Judge of this court held that tenant, to claim benefit under the Act, should prove physica possession. The Hon'ble Supreme Court of India, in the judgmen reported in 2003 (3) CTC Pg.488 (Radhakrishnan S.R. Vs. Neelamegam) ha clearly held that, to get relief under section 9 of the Tamil Nad City Tenants' Protection Act, the tenant should be in possession of th land. We extract paragraph No.14 in the said judgment.

"14. Our attention was invited to various decisions of the Madras High Court taking the same view i.e., actual physical possession of the demised premises is essential to maintain an application under section 9 of the Act. As a matter of fact the learned counsel for the appellant cited the case in Estate of T.P.Ramaswami Pillai Vs. Mohd. Yousuf and others, (1983 (2) MLJ 319) which takes the same view."

In 2003 (1) CTC Pg.199 (B.S.Nagarajan Vs. K.B.Sivasankaran) a Divisio Bench of this court also held that "tenants who are in actual physica possession alone can claim protection under Tenants Protection Act" It has also held in that judgment as hereunder:

"Of course, an attempt was made by the learned counsel for the appellant to show that still some portion of it is retained. The demarcation of the portion in his occupation was not done and there is no dispute that a major area of the superstructure is not in his possession."

Therefore, the long line of decisions referred to above clearly poin out one thing and that is, if a tenant wants to get the benefit unde section 9 of the Tamil Nadu Tenants' Protection Act, he must be i actual physical possession of the land and building and the tenant o his predecessors in interest ought to have erected that building.

12. The question that next follows is, what is the "land" o which he must be in possession? The land is referable to the lan

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demised at the inception namely, the entirety of the land demised a the inception of the tenancy. To put it more precisely, if a tenan wants to have the benefit of section 9 of the Tamil Nadu City Tenants Protection Act, he must establish that he continues in actual physica possession of the entire extent of land demised to him or to hi predecessor in interest. In addition to being in actual physica possession of the land, he must also be in actual physical possessio of the building. The expression "actual physical possession" relate to both land and building. It is therefore clear from the abov pronouncements that the defendant in the case on hand, to get an orde directing the plaintiff to sell the land to him, should show that h continues in actual physical possession of the land demised to hi predecessor in interest at the inception and the building which was pu up by such predecessor in interest. We have already held, i interpreting section 2(4)(ii)(b) of the Act, that "any land" occurrin in the opening words of that sub-section means the extent of land tha was demised at the inception and the expression "such land", whereve it occurs in clause (b), is referable only to the land demised at th inception. The extent of land demised at the inception is shown to b 10000 sft. Ex.C.2 is the plan submitted by the Advocate Commissione appointed by the lower court. Ex.C.1 is his report. Before th Commissioner, the defendant's Sales Officer by name Shri.S.Vishnu Ra was examined. His evidence is found to be noted in paragraph No.11 o the Commissioner's report (We do not find any separate notes o evidence). According to his evidence, the company is occupying th entire area consisting of sales building, service station, undergroun tank and well, besides a store-room and the entire extent of land unde their occupation is absolutely necessary for their business. Unde section 2(4)(ii)(b) of the Act, the requirement is that, the tenant o his predecessor in interest should have erected a building on such lan and who continues in actual physical possession ..... From a readin of the section, it appears to us that, on the entire extent of lan demised, there need not be any construction and it is enough th tenant or his predecessor in interest should have erected any building

13. Mr.N.R.Chandran learned senior counsel appearing for th plaintiff contended that the expression "who continues" ..... should mean that such possession must be an uninterrupted possession According to him, since it is found in the earlier proceedings that th defendant had lost possession in favour of a third party, it cannot b said that the defendant continues in actual physica possession ..... Mr.G.Masilamani learned senior counsel appearin for the defendant, by taking us through Concise Oxford Dictionary, 10 Edition, Page 308, would contend that the word "continue"/ "continues" "continued"/ "continuing" means, among other things, re-commence o resume. Therefore, according to the learned senior counsel, if tenant continues in actual physical possession of the land an building on the day when the application is filed and his rights com to be decided, it is immaterial whether during the past he had los possession. As rightly contended by the learned senior counsel, th expression "continues", among other things, gives the meaning a

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indicated above. For the present, we will examine the rights of th tenant from the angle namely, the defendant, who lost possessio earlier, had regained it before the filing of the application unde section 9 of the Act. Tenant getting into possession; losin possession for one reason or other and re-gaining possession, is pure question of fact. Therefore there must be pleading and proof o this aspect. We find that it is totally wanting. There was an earlie suit in O.S.No.4400/1972 filed by the plaintiff herein against th defendant and it's predecessor in interest claiming the relief o possession. It was alleged in that plaint that

> "the defendant's predecessor in interest had sub-leased the property to M/s.M.R.K.Agency; the sub-lessee put up a pump and underground storage tank; the sub-lessee put up an additional super-structure without any right, wherein, a business by name Auto Enterprises is carried on and under the lease document, only the predecessor in interest alone can put up a superstructure".

The defendant's predecessor in interest defended that suit by denying among other things, sub-letting, by stating that

> "under clause (a) of the lease agreement between the parties, liberty was given to him to underlet the demised premises or in part thereof to any local dealer or agent; accordingly, the defendant had granted a licence in favour of M/s.M.R.K.Agency and they have every right to put up a service station, underground storage, etc.....".

The learned trial Judge, on that issue, found that there was n prohibition in the lease deed for sub-letting or underletting by th defendant's predecessor in interest. The suit was dismissed. Th First Appellate Court in A.S.No.337/1979, recorded, after noting th finding of the trial court that the agreement of lease provides fo sub-lease and consequently there has been no breach of the lease terms that the plaintiff did not advance any argument whether there was an breach of the terms of the lease at all.

14. At this stage, it has become necessary for this court t consider C.M.P.No.14303/2005. This is an application filed under Orde 41 Rule 27 of the Code of Civil Procedure. Reception of additiona evidence is hotly contested by the defendant stating that none of th requirements of Order 41 Rule 27(1) of the Code of Civil Procedure ar satisfied. The two documents submitted as additional evidence ar nothing but the printed copy of the judgment in O.S.No.4400/1972 on th file of the 4th Assistant City Civil Judge, to which, the plaintiff the present defendant and his predecessor in interest are parties ar the second document is the printed copy of the judgment in A.S.No.337 1979 arising from the judgment in that suit. At the risk o repetition, we state that the plaintiff and the defendant are partie to those two judgments. Strictly speaking, it is not possible to sa

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that the plaintiff is not aware about the existence of these tw judgments. It is not the case of the plaintiff that the trial cour refused to admit such documents. If that is so, then the requirement of Order 41 Rule 27(1)(a) and (b) of the Code of Civil Procedure ar not satisfied at all. Does it mean that such intra-party document should not be admitted at all in evidence? For this purpose, we fin that the second limb of Order 41 Rule 2 (1)(c) i.e., "for any othe substantial cause" gives the answer. Under that second part, th appellate court can require additional evidence "for any othe substantial cause". A Constitution Bench of the Supreme Court, in th judgment reported in AIR 1963 SC Pg.1526 (K.Venkataramiah Vs Seetharama Reddy), while dealing with the power of the appellate cour to receive additional evidence, had held as hereunder:

> "(16) In view of what the High Court has stated in this passage it is not possible to say that the High Court made the order for admission of additional evidence without applying its mind. It seems clear that the High Court thought, on a consideration of the evidence, in the light of the arguments that had been addressed already before it that it would assist them to arrive at the truth on the question of Seetharam Reddy's age if the entries in the admission registers of the school were made available. It was vehemently urged by the learned counsel for the appellant that there was such a volume of evidence before the High Court that it could not be seriously suggested that the Court required any additional evidence "to enable it to pronounce judgment." the requirement, it has to be remembered, was the requirement of the High Court, and it will not be right for us to examine the evidence to find out whether we would have required such additional evidence to enable "us" to pronounce judgment. Apart from this, it is well to remember that the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment", it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under R.27(1)(b) of the Code."

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"(17) It is easy to see that such requirement of the Court to enable it to pronounce judgment or for any other substantial cause is not likely to arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence. That is why in Parsotim Thakur Vs. Lal Mohar Thakur, 53 Ind App 254: (AIR 1931 PC 143) the Privy Council while discussing whether additional evidence can be admitted observed:

"It may be required to enable the Court to pronounce judgment, or for any other substantial cause, but in either case it must be the Court that requires it. This is the plain grammatical reading of the sub-clause. The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent."

"(18) As the Privy Council proceeded to point out:

"It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands."

Mr.G.Masilamani, learned senior counsel, relying upon the judgment o the Supreme Court in the case reported in (2001) 1 SCC Pg.309 (Mahavi Singh Vs. Naresh Chandra) opposed the receipt of additional evidence The Supreme Court, in that judgment had held as hereunder:

"Section 107 CPC enables an appellate court to take additional evidence or to require such other evidence to be taken subject to such conditions and limitations as are prescribed under Order 41 Rule 27 CPC. The principle to be observed ordinarily is that the appellate court should not travel outside the record of the lower court and cannot take evidence on appeal. However, section 107(d) CPC is an exception to the general rule, and additional evidence can be taken only when the conditions and limitations laid down in the said rule are found to exist. The court is not bound under the circumstances mentioned under the rule to permit additional evidence and the parties are not entitled, as of right, to the admission of such evidence and the matter is entirely in the

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discretion of the court, which is, of course, to be exercised judiciously and sparingly. (Para 5)

Order 41 Rule 27 CPC envisages certain circumstances when additional evidence can be adduced:

(i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(ii) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(iii) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

In the expression "to enable it to pronounce judgment" as used in Order 41 Rule 27(b) CPC the ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of the court delivering it. It is only a lacuna in the evidence that will empower the court to admit additional evidence. (Para 5)

Syed Abdul Khader Vs. Rami Raddy, (1979) 2 SCC 601 : AIR 1979 SC 553; Municipal Corpn. Of Greater Bombay Vs. Lala Pancham, AIR 1965 SC 1008: (1965) 1 SCR 542, relied on

But a mere difficulty in coming to a decision is not sufficient for admission of evidence under this rule. The words "or for any other substantial cause" must be read with the word "requires", which is set out at the commencement of the provision, so that it is only where, for any other substantial cause, the appellate court requires additional evidence, that this rule would apply."

In the judgment relied upon by the learned senior counsel for th defendant, we find that the Supreme Court's view - emphasize portion - appears to be in line with the judgment of the Constitutio Bench of the Supreme Court referred to supra.

15. Having regard to the crucial issue arising for considerati in the application filed under section 9 of theTamil Nadu City Tenants

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Protection Act, we have no doubt at all that this court definitel requires the two documents produced before us by the plaintiff. I fact, the judgments in O.S.No.4400/1972 and A.S.No.337/1979 wer challenged before this court in S.A.No.2257/1981 and it came to b dismissed "as not pressed" on 08.01.1992 by this court. Therefore eve without an application from either party, this court, on it's own could have sent for the records from this Registry in S.A.No.2257/198 for consideration. Interest of justice also requires the productio of the two documents referred to above before this court. Those tw documents would safely guide this court to give a correct judgment an thereby avoiding any injustice to a litigant, who has a right to ge justice. Therefore we receive the two documents filed along wit C.M.P.No.14303/2005 as documents required by this court to pronounc the judgment and they stand exhibited as Court Exhibits i.e., C.1 an C.2.

16. The judgment in O.S.No.4400/1972 shows that the defendan therein had contended that sub-letting is permissible under the leas deed and there was no sub-letting but instead, there was only unde letting. The judgment also shows that the defendant therein asserte the right of the person, to whom the property was underlet, to put u the construction. When the defendant in the suit on hand is facing s much of facts, then, he ought to have pleaded and proved that eithe the defendant or it's predecessors in interest had resumed possessio from the person to whom the property was underlet. In this case, ther is neither pleading nor proof. The argument advanced by the learne senior counsel for the defendant is though the plaintiff may conten that the defendant might have lost possession earlier due t underletting, yet, when he continues to be in actual physica possession of the land and building as on date, he should not be denie the relief under section 9 of the Act. In our considered opinion an on a careful reading of section 2(4)(ii)(b) of the Act, such a argument would not lie in the mouth of the defendant. To understan the true meaning of any provision of law, it must be read as a whol and the court should give, on such reading, the normal meaning which i explicitly conveys. Clause (b) of section 2(4)(ii) of the Act consist of three parts and they are as hereunder:

> "any person who was a tenant in respect of such land under a tenancy agreement to which this Act is applicable under sub-section (3) of section 1"
>
> "and who or any of his predecessor in interest had erected any building on such land"
>
> "and who continues in actual physical possession of such land and building ....."

From the above, it is seen that part 3 is telescoped into part 2 an which in turn is telescoped into part 1 by the use of the word "and" i two places, which means, the requirement contemplated under clause (b of section 2(4)(ii) of the Act is one continuous act. As alread

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noted, the Act is a beneficial Legislation and therefore if a perso wants to have the benefit of the Act, he must strictly comply with th requirement of the said Act. If the argument of the learned senio counsel for the defendant is accepted, then, a tenant, who is inducte into possession of land, may sub-let, though with authority; los possession; allow the person put into possession to put up construction; resume possession of the land and building put up by th person inducted into possession at any time as he likes and then clai the benefit of the Act. In our considered opinion, that is not th intention of the Legislature. Learned senior counsel for th defendant strenuously contended that Exs.C.1 and C.2 may only show tha the predecessor in interest of the defendant had only given a "licence to M.R.K.Agency; "licence" is different from "lease"; in the case o "licence", the licensee do not get exclusive possession to deny acces to the licensor and therefore it must be held that the defendant an it's predecessor in interest continued in actual physical possession o the land and building. Though such is the stand of the defendant i O.S.No.4400/1972, which judgment is before us now, yet, we do not ge any finding at all on that point in that judgment. The court, in tha case, proceeded to dismiss the suit on the ground that in th registered lease deed, there is an express provision for sub-lettin and therefore it did not go into the nuance of lease/licence. Th defendant's predecessor in interest had not placed any material at al in O.S.No.4400/1972 as to what is the nature of right they have give to M.R.K.Agency. "Licence" involves granting permission to use th property. In case of "licence", the lessor has the right of entr without the permission from the licencee. Even assuming that th predecessor in interest of the defendant had only given the "licence to M.R.K.Agency, it definitely means that the predecessor in interes of the defendant could not have been in actual physical possession o the land and building. The Hon'ble Supreme Court of India in the cas reported in (2002) 5 SCC Pg.361 (Corporation of Calicut Vs K.Sreenivasan) had discussed what right flow out of a licence granted We extract paragraph 16 in the said judgment as hereunder:

> "It is true that a licensee does not acquire any interest in the property by virtue of grant of licence in his favour in relation to any immovable property, but once the authority to occupy and use the same is granted in his favour by way of licence, he continues to exercise that right so long the authority has not expired or has not been determined for any reason whatsoever, meaning thereby so long the period of licence has not expired or the same has not been determined on the grounds permissible under the contract of law. Occupation of the licensee is permissive by virtue of the grant of licence in his favour, though he does not acquire any right in the property and the property remains in possession and control of the grantor, but by virtue of such a grant, he acquires a right to remain in occupation so long the licence is not revoked and/or he is not evicted from its occupation either in accordance with law or otherwise."

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Therefore, if the argument of the learned senior counsel for th defendant that it is enough if the defendant shows that it is in actua physical possession of the land and building on the day when th application was filed to grant benefits under the Act has to b accepted, then, there must be pleading and proof on that vital aspect On a perusal of the pleadings, we find that the defendant had no pleaded at all and therefore, in the absence of pleading and proof this argument cannot be sustained.

17. We are also not prepared to accept the argument advanced b the learned senior counsel for the defendant that continuous actua physical possession of such land and building with the defendant nee not be established. We again go back to section 2(4)(ii)(b) of th Act. We split section 2(4)(ii)(b) of the Act as hereunder:

"any person who was a tenant in respect of such land under tenancy agreement to which this Act is applicable under sub-section (3 of section 1";

"and who or any of his predecessors in interest had erected an building on such land";

"and who continues in actual physical possession of such land an building etc.,....."

If we read section 2(4)(ii)(b) of the Act, the expression "who occurring in part 3 and part 2 as divided above is referable only t "any person" appearing as the opening words of part 1. It is therefor clear that it deals with the right of a person who is a tenant and suc a tenant can take advantage of any building erected on such land either by himself or by his predecessors in interest. Therefore w have no doubt at all that "actual physical possession" contemplate under section 2(4)(ii)(b) of the Act must be the actual physica possession of the person who was a tenant and nobody else. In othe words, construction of section 2(4)(ii)(b) of the Act do not recognis actual physical possession of such land and building with any perso other than the person referred to in that sub-section. If we examin the rights of the parties on the above basis, then, we have no doubt a all that the arguments advanced by Mr.N.R.Chandran learned senio counsel appearing for the plaintiff that uninterrupted possession o such land and building with the person claiming benefits under the Ac must be established, deserves acceptance and accordingly accepting it we reject the argument of Mr.G.Masilamani learned senior counse appearing for the defendant pointing out the contra. Exs.C.1 and C. show that possession of the defendant and it's predecessor in interes had been interrupted. Under these circumstances, we have no hesitatio at all to hold that even on this ground, the defendant must fail.

18. Learned senior counsel for the defendant seriously accused th plaintiff for not pleading that the defendant is out of possession an therefore he is not entitled to the relief under the Tamil Nadu Cit

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Tenants' Protection Act. In a suit for possession, the plaintiff ha to only plead that the tenancy had come to an end and the tenancy ha been terminated. The present suit is on the ground that the leas period namely, 10 + 10 years equivalent to 20 years had already expire and the defendant is to deliver possession of the property.

The plaintiff, in such a suit, need not allege anything else. Th right under section 9 of the Tamil Nadu City Tenants' Protection Act i conferred only on the tenant/defendant in possession. It is for him t exercise his right under that section or give it up, since such a righ is capable of being waived. Therefore it is clear to our mind tha the plaintiff, in a simple suit for ejectment, need not plead as to wh the defendant should not be given any relief under the Act referred t above and the initial burden is on the defendant to plead that he i entitled to the protection under the said Act. In the writte statement, besides stating that it is a tenant within the meaning o the Act, a reference is also made to the filing of I.A.No.12457/198 under section 9 of the Act. In the earlier portion of this judgment we have already extracted in extenso the pleading of the defendant i I.A.No.12457/1982. Suffice it to point out at this stage that th pleading in that regard is only as hereunder:

> "It is not disputed that ever since 22.6.1962 Standard Vaccum Oil Company and its successors in interest companies have been in continuous possession of the suit site."

The plaintiff filed a counter contending in sum and substance that th defendant is not a tenant under the Act referred to above.

19. Since it is the defendant who wants an order in his favou under section 9 of the Tamil Nadu City Tenants' Protection Act, we hol that the defendant must plead and prove that he is a "tenant" a defined under section 2(4)(ii)(b) of the Act. If there is neithe pleading nor evidence, then the defendant goes out of court. If ther is proof without pleading, then such evidence cannot be looked into a all. If there is only pleading and there is no proof, even then th defendant goes out of court. Therefore the defendant must plead an prove the cause of action for him - the cause of action being that h is a tenant within the meaning of section 2(4)(ii)(b) of the said Act The Hon'ble Supreme Court of India in the case reported in (1994) 6 SC Pg.322 (Bloom Dekor Limited Vs. Subhash Himat Lal Desai) had explaine what the expression "cause of action" means. We extract the sam hereunder:

> "By "cause of action" it meant every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, a bundle of facts which it is necessary for the plaintiff to prove in order to succeed in the suit ....."

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Therefore a duty is cast upon the defendant to plead the necessar facts before ever he could get an order in his favour under section of the said Act. Order 6 Rule 2(1) of the Code of Civil Procedur reads as hereunder:

> "Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."

Order 6 Rule 4 of the Code of Civil Procedure reads as hereunder:

> "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading."

Therefore it is clear that there is a marked difference betwee "material facts" and "material particulars". The Hon'ble Supreme Cour of India had an occasion to consider these two expressions namely "material facts" and "material particulars" in the judgment reported i (1997) 1 SCC Pg.511 (Udhav Singh Vs. Madhav Rao Scindia) equivalent t AIR 1976 SC Pg.744. In that judgment, failure to plead as per th mandate of Section 83 of the Representation of People Act came up fo consideration. Section 83 of the Representation of People Act reads a hereunder:

> "(1) An election petition -
> (a) shall contain a concise statement of the material facts on which the petitioner relies:
> (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice, and
> (c) * * * *"

The Supreme Court went on to hold that, like the Code of Civi Procedure, section 83 of the Representation of People Act als envisages a distinction between "material facts" and "materia particulars". We extract paragraph Nos.41, 42 and 43 of the sai judgment hereunder:

> "41. Like the Code of Civil Procedure, this section also envisages a distinction between "material facts" and "material particulars".

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Clause (a) of sub-section (1) corresponds to Order 6, Rule 2, while clause (b) is analogous to Order 6, Rule 4 and 6 of the Code. The distinction between "material facts" and "material particulars" is important because different consequences may flow from a deficiency of such facts or particulars in the pleading. Failure to plead even a single material fact leads to an incomplete cause of action and incomplete allegations of such a charge are liable to be struck off under Order 6, Rule 16, Code of Civil Procedure. If the petition is based solely on those allegations which suffer from lack of material facts, the petition is liable to be summarily rejected for want of a cause of action. In the case of a petition suffering from a deficiency or material particulars, the court has a discretion to allow the petitioner to supply the required particulars even after the expiry of limitation."

"42. All the primary facts which must be proved at the trial by a party to establish the existence of a cause of action or his defence, are "material facts". In the context of a charge of corrupt practice, "material facts" would mean all the basic facts constituting the ingredients of the particular corrupt practice alleged, which the petitioner is bound to substantiate before he can succeed on that charge. Whether in an election petition, a particular fact is material or not, and as such required to be pleaded is a question which depends on the nature of the charge levelled, the ground relied upon and the special circumstances of the case. In short, all those facts which are essential to clothe the petitioner with a complete cause of action, are "material facts" which must be pleaded, and failure to plead even a single material fact amounts to disobedience of the mandate of section 83(1)(a).

"43. "Particulars", on the other hand, are "the details of the case set up by the party". "Material particulars" within the contemplation of clause (b) of section 83(1) would therefore mean all the details which are necessary to amplify, refine and embellish the material facts already pleaded in the petition in compliance with the requirements of clause (a). "Particulars serve the purpose of finishing touches to the basic contours of a picture already drawn, to make it full, more detailed and more informative."

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The Supreme Court, in AIR 1979 SC Pg.134 (T.H.D.Vashista Vs. Glax Laboratories) emphasized the need to plead material facts constitutin the cause of action and the consequence of it's failure. In AIR 196 SC Pg.735 (Bhagwati Vs. Chandramaul), the Supreme Court had held a hereunder:

> "Undoubtedly if a party asks for a relief on a clear and specific ground, and if the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new. But in considering the application of this doctrine to the facts of a particular case Court must bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance."
>
> "If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

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In AIR 1947 Privy Council Pg.132 (Gopalakrishnayya Vs. Madras Province the Privy Council had held as hereunder:

> "The rule that material facts should be pleaded is no mere technicality, and an omission to observe it deprives pleadings of most of their value and may increase the difficulty of the Court's task of ascertaining the rights of the parties."

The position that could be culled out from the above case laws is that pleading must contain all "material facts". "Material particulars are those which, on furnishing, gives an expansion of a party's cas based on material facts pleaded. Even in the absence of pleadings, i the parties to the trial knew what the issue is and they have let i evidence, then, absence of pleading would not come in the way of th court considering the claims. If the parties do not know the matter i issue and one of the contesting parties lets in evidence in respect o that matter, then, it would undoubtedly be a different matter. In suc circumstances, to allow one party to rely upon a matter in respect o which the other party did not lead evidence and has had no opportunit to lead evidence, would introduce considerations of prejudice and i doing justice to one party, the court cannot do injustice to another Mr.G.Masilamani learned senior counsel, citing the judgment of th Hon'ble Supreme Court of India in the case reported in (2004) 1 SC Pg.551 (V.Rajeshwari Vs. Saravanabava), submitted that the plaintif did not plead in the plaint that the defendant is not in possession; i the counter filed to the application filed under section 9 of the sai Act, no such definite stand had been taken; not even in the grounds o appeal filed against the decree in the suit or in the order passe under the Act, any such ground had been taken and therefore, b producing additional evidence, the plaintiff should not be allowed t contend that point. This argument of the learned senior counsel fo the defendant proceeds on the basis that the initial burden is on th plaintiff to plead and prove to non-suit the defendant from getting an benefit under the Act. This is just like putting the cart before th horse. We have already held that the initial burden is on th defendant to plead and prove it's case (i.e.) the defendant i entitled to an order in it's favour under section 9 of the

said Act. Under these circumstances, we are inclined to reject th argument advanced by the learned senior counsel for the defendant tha since the plaintiff failed to plead and prove that the defendant is no entitled to the relief under the Act, the defendant cannot be foun fault with for lack of pleading or inadequate pleading and as a resul of the plaintiff's failure to plead and prove, the defendant i entitled to the right as a matter of routine.

20. We have clearly spelt out the requirements which a tenant, t get the benefit under section 9 of the Tamil Nadu City Tenants Protection Act, must satisfy. To reiterate, the requirements are a

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hereunder:

(a) The defendant or his predecessor in interest should have erected any building on such land; and

(b) the defendant or his predecessor in interest continues in actual physical possession of such land and building.

In this case, the defendant, on whom the initial burden to plead an prove it's case lies, had not pleaded any where that it's predecesso in interest had put up a building on the land demised originally an the defendant or it's predecessor in interest continues in actua physical possession of such land and building. Therefore, when th defendant had not pleaded such "material facts", it must be held tha the defendant is before the court in the application filed unde section 9 of the Act on an "incomplete cause of action". Then, as hel by the courts in the various judgments referred to supra, the defendar must be non-suited on that ground alone. We find from the pleading that the plaintiff had resisted the defendant's claim by stating tha it is not the "tenant" within the meaning of the Act. The expressio "actual physical possession" excludes symbolical possession. In othe words, actual physical possession of such land and building put up a referred to above must be with the person who claims the protectio under the Act. The judgment in O.S.No.4400/1972, rendered between th parties on an earlier occasion and received by this court as require by it to pronounce judgment, undoubtedly shows that the defendant' predecessor in interest had underlet the property. The defendant' predecessor in interest had pleaded that it is only that person, t whom the property had been underlet, had put up the constructior Therefore, one of the essential requirements of section 2(4)(ii)(b) o the Act that the building standing on the land ought to have bee erected by the defendant's predecessor in interest, remains no established. Even before the Advocate Commissioner appointed unde section 9 of the Act, the defendant's witness had not stated that it' predecessor in interest had erected the building. Such can never b the evidence because, in the judgment in O.S.No.4400/1972, th defendant's predecessor in interest had asserted the right of th person to whom the property was underlet to put up constructior Therefore it is clear that the building, which stands in the land as o date, had not been put up either by the defendant or it's predecesso in interest and therefore the building admittedly erected by a perso other than the defendant or it's predecessor in interest cannot b equated to a building erected on such land by the defendant or it' predecessor in interest. Of course, from the report filed by th Advocate Commissioner appointed under section 9 of the said Act, it i seen that the defendant's employee, examined as a witness, had depose that the company is in possession of the property. There is n reference at all in that report that the defendant continues in actua physical possession of the property. As already noted, in the face o the judgment in O.S.No.4400/1972 between the parties, where it is see that the predecessor in interest of the defendant had admitted that h had under-let the property since it not prohibited under the leas

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deed. It is not possible to accept that the defendant continues ar it's predecessor in interest continued in actual physical possession o the land and building.

21. Accordingly, we answer issue No.(a) framed by us against th defendant and issue No.(b) in favour of the plaintiff. On issue No (c), no argument at all had been advanced and accordingly, th judgment, so far as it relates to the quantum of damages decreed, i confirmed. The judgment under challenge so far as issues (a) and (b are concerned are set aside. As a result thereof, A.S.No.113/199 stands allowed by setting aside the judgment and decree date 21.12.1983 in O.S.No.3590/1982 on the file of the II Additional Cit Civil Judge, Madras and instead, the said suit would stand decreed fo possession. Time for delivering possession is sixty days from the date of receipt of a copy of this judgment. Since this court has found tha the superstructure, which stands on the land forming the subject matte of the suit, is not shown to have been erected by the defendant or it' predecessor in interest, the defendant is not entitled to ar compensation as provided for under section 3 of the Tamil Nadu Cit Tenants' Protection Act. As a result of the judgment i A.S.No.113/1991, C.M.A.No.336/1987 stands allowed by setting aside th order and decreetal order dated 21.12.1983 in I.A.No.12457/1982 i O.S.No.3590/1982 on the file of the II Additional City Civil Judge Madras. As a consequence thereof, I.A.No.12457/1982 stands dismissed There will be no order as to costs in both the proceedings before thi court.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

Vsl

To

1. The Registrar, City Civil Court, Madras

2. The Section officer,
V.R. Section,
High Court, Madras.

2 ccs to Mr.R.Bharanidharan, Advcate, Sr. 46784, 46785
2 ccs to M/s. King and Patridge, Advocate, sr,. 46787 & 46788

A.S.NO.113/1991, C.M.P.NO.
14303/05 & C.M.A.NO.336/1987

VC (CO)
KK 23/11

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